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August 2, 2013

RECEIVED

Dr. Sandra Dudley
Director
Division of Water Resources
Tennessee Department of Environment and Conservation
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 12th Floor
Nashville, TN 37243

AUG 06 2013

TN DEPT. OF ENVIRONMENT
AND CONSERVATION
DIVISION OF WATER RESOURCES

Dear Dr. Dudley:

I am writing to request the opportunity for TCWN and other interested environmental organizations to meet with DWR staff to discuss several key issues related to TDEC's NPDES permitting. We believe a frank and open dialogue outside the context of a specific permit challenge or enforcement matter would promote a better mutual understanding of our positions and allow the possibility of a non-adversarial resolution of our concerns. In particular, TCWN is requesting meetings¹ to discuss the following topics:

1. TDEC's Nutrient Reduction Strategy

As you may know, TCWN has been seeking stronger NPDES permits to protect Tennessee streams from nutrient pollution for well over five years. We do this work as part of the Mississippi River Collaborative, which is seeking to reduce the impact of basin-wide nutrient contributions to the Gulf of Mexico. We routinely comment on draft permits for facilities that discharge to nutrient-impaired waters and have three pending permit appeals regarding nutrients. We are currently reviewing several draft NPDES permits that we believe would not adequately regulate nutrients if issued as proposed.

However, our recent conversations with you and your staff indicate that TDEC is moving forward in a positive direction to implement its Nutrient Reduction Strategy. We would like to meet with DWR permitting, planning, and watershed management staff to discuss TDEC's plans to address nutrient pollution in the future, and to share our observations and concerns about the Nutrient Reduction Strategy.

Stephanie Matheny recently proposed this meeting to Vojin Janjić, who agreed we should meet sometime in early August. Accordingly, we simply request that TDEC propose possible dates for this meeting so we can set it up as soon as possible.

¹ Because each of these issues is individually significant, and because there are different TDEC staff and different environmental organizations who would participate, we envision three separate meetings to take place over the next several months.

2. Coal Mine Permitting

TCWN has been working closely with its partners, the Sierra Club, Statewide Organizing for Community eMpowerment, and Defenders of Wildlife to track, comment on, and appeal NPDES permits for coal mines in Tennessee. We are particularly concerned with TDEC's reluctance to impose needed water quality-based effluent limits at coal mines and the negative impact this has on water quality, local communities, and threatened & endangered species.

We have commented on a number of permits regarding improper reasonable potential analysis ("RPA") for pollutants subject to numeric water quality criteria (*e.g.*, selenium, mercury, thallium, and cyanide), and EPA has sent comments to TDEC generally in agreement with our assessment. As we have observed, and discussed with TDEC staff, the mining division appears to be taking a different approach to RPA from that of the Water-Based Systems group, an approach that conflicts with both TDEC's Reasonable Potential Procedures and applicable EPA regulations.

We have also commented – and EPA has also generally agreed with our comments – regarding TDEC's failure to adequately protect streams from violations of narrative water quality criteria. Many of the pollutants discharged from coal mines are subject to narrative water quality criteria, including total suspended solids, total dissolved solids, sulfates, manganese, aluminum, iron, and the constituents reflected by specific conductivity. In part as a result of TDEC's failure to systematically regulate these pollutants, many streams in Tennessee mining country are biologically impaired.

We are also very concerned with the position taken by TDEC that it is preempted by the federal Endangered Species Act from considering impacts on threatened and endangered species in its NPDES permitting. This position contradicts TDEC's obligation pursuant to its NPDES Memorandum of Agreement with EPA ("MOA"), which provides that "the Division will comply with applicable federal laws in accordance with 40 C.F.R. § 124.59" and requires the Division to "consider issues raised by the EPA or the Service regarding federally-listed species or designated critical habitat." MOA Section IV.E. We believe TDEC can – and must – impose limits sufficiently stringent to protect these species as part of its obligation to protect narrative water quality criteria, including limits on conductivity to protect blackside dace.

Accordingly, we would like to set up a meeting between TDEC and representatives from each of these four groups to discuss future coal mine permitting in Tennessee.

3. Enforcement

TCWN is very disappointed in the level of NPDES permit enforcement² TDEC is currently undertaking and believes this lack of enforcement is likely having a negative impact on water quality statewide. As detailed in TCWN's Enforcement Report: Summary of Tennessee's Water

² TCWN is also concerned with ARAP enforcement, but that is the subject of separate discussions.

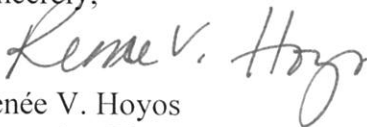
Enforcement Program in 2011 and 2012, available at <http://www.tcwn.org/20112012EnfRep>, there has been a 75% decline in DWR enforcement orders from 2007 to 2012. In 2012, TDEC issued a paltry 53 enforcement orders statewide, calling into question whether TDEC is satisfying its fundamental obligation under the MOA to “[m]aintain a vigorous program of taking timely and appropriate enforcement actions.” MOA Section III.A.6.

The Clean Water Act and the Tennessee Water Quality Control Act cannot be effectively implemented without predictable, systematic, and even-handed enforcement. While many permittees take their compliance obligations seriously and scrupulously avoid permit violations, there are far too many dischargers who do whatever they can get away with. Unfortunately, those in the latter category are taking advantage of the current climate of impunity, and there is a perception both among TDEC staff and in the broader community that DWR is no longer in the business of enforcing its permits.

TDEC has not responded directly to TCWN regarding the findings of this report. Although Dr. Meghreblian had indicated at the April 2013 TWG brownbag that TDEC would address this issue at the next quarterly brownbag, that discussion did not take place. We request a meeting between TDEC, TCWN, and representatives of each interested environmental organization so we can better understand TDEC’s NPDES enforcement priorities and strategies moving forward.

I thank you in advance for your consideration of these requests, and look forward to your response. Please call me at 865.522.7007 x 100 or email me at renee@tcwn.org to discuss when we can set up these meetings.

Sincerely,


Renée V. Hoyos
Executive Director